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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2022AP000634

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

WARNER E. SOLOMON,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

On Notice of Appeal from a Judgment of Conviction
Entered in the Racine County Circuit Court,
the Honorable Wynne P. Laufenberg Presiding

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ARGUMENT

I. PROBABLE CAUSE TO SEARCH THE VEHICLE.

The State argues that the smell of marijuana in a car automatically provides the probable cause to support a search under the automobile exception to the warrant requirement. (State's Brief 10-15.) Citing *State v. Secrist*, 224 Wis. 2d 201, ¶ 16, 589 N.W.2d 387 (1999), it suggests that there is a bright line rule that whenever a law enforcement officer smells what they might believe is marijuana emanating from a vehicle, they are authorized to search it.

The *Secrist* court emphasized that it is the “unmistakable odor of marijuana coming from an automobile” that provides the probable cause to search it. *Id.* Because it is legal to consume Cannabinol (CBD), a derivative of the hemp plant which contains trace amounts of Tetrahydrocannabinol (THC) which is illegal to possess, the smell of marijuana may not be as unmistakable as it once was thought to be.¹ Though Deputy Valenti testified that he was trained to distinguish between the odor of raw and burnt marijuana (R.89:20-21), there was no testimony that he could distinguish the odor of legal CBD and prohibited THC, if differentiating between the two is possible. As such, the odor alone is arguably insufficient to establish the probable cause necessary to search the vehicle.

The State asserts that it makes no difference that the odor of marijuana was linked to Solomon's brother and not to him. However, it is relevant when assessing the totality of the circumstances. Just as probable cause to arrest diminishes if the odor of marijuana “is not strong or recent, if the source of the odor is not near the person, if there are several people in the vehicle, or if a person offers a reasonable explanation for the odor,” *Secrist* at ¶ 34, Solomon contends that the probable cause to search a vehicle dissipates if a passenger is the source of the odor.

The State maintains that on the body cam Solomon's

¹ See the District IV Court of Appeals decision in *State of Wisconsin v. Quaheem O. Moore* (Appeal No. 2021AP938-CR), an unpublished decision cited for persuasive authority under Wis. Stat. § 809.23(3), filed with this brief.

brother can be heard mumbling a response (“mm-hmm”) when asked whether he smoked marijuana in the car, and that he later explained that he had picked up Solomon. (R. 111, Ex. 2, 13:58; 16:16-16:27.) The audio is somewhat difficult to hear, however, and Deputy Valenti testified that Solomon’s brother “advised that he smoked marijuana an hour prior before (sic) his brother picked him up while he was at work.” (R.89:22.) In any event, the odor of marijuana coming from a specific passenger, when the driver does not smell of marijuana and is not exhibiting any signs of impairment or otherwise acting in a suspicious manner, should be part of the probable cause analysis to search the vehicle.

As noted in Solomon’s brief, a justifiable stop may be broadened beyond its initial purpose “if additional suspicious factors come to the officer’s attention,” but those factors must be “particularized” and “objective.” *State v. Betow*, 226 Wis. 2d 90, 91, 595 N.W.2d 499 (1999). Here, Deputy Valenti’s reliance on the Solomon brothers’ prior criminal records, the time of day, the vehicle being owned by someone else, and general concerns about hidden compartments is insufficient to broaden the investigation beyond the stop for speeding. When Deputy Valenti found nothing incriminating after conducting a hand search of the vehicle, there was even less reason to continue the search.

II. UNLAWFUL EXTENSION OF THE STOP.

The State argues that Solomon cites no authority for the proposition that probable cause “is dispelled when an officer performs a quick search of a vehicle.” (State’s Brief, 16.) But that is precisely the point of the requirement enunciated in *Betow* that a seizure may be expanded only if additional suspicious factors come to light. A traffic stop can become unlawful when it is extended beyond the time reasonably necessary to complete the mission of the stop. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). Probable cause can dissipate, which is the rationale behind the statutory rule (Wis. Stat. § 968.15(1)) that requires warrants returned within 5 days. See *State v. Edwards*, 98 Wis. 2d 367, 372, 297 N.W.2d 12 (1980) citing *United States v. Bedford*, 519 F.2d 650 655 (3d Cir. 1975). In *State v. Koch*, the court held that the defendant’s warrantless arrest “was made on probable cause which did not

dissipate.” 175 Wis. 2d 684, 699, 499 N.W.2d 152 (1993). The law recognizes that probable cause is not a static construct and law enforcement officers are not allowed to ignore changing circumstances when discharging their duties.

Here, Solomon was stopped for speeding. Deputy Valenti smelled the odor of burnt marijuana and broadened the mission of the stop to hand search the interior of the vehicle. He then further broadened the mission of the stop to accommodate a canine search without additional suspicious factors coming to light. Solomon contends that this constitutes an unreasonable extension of the stop.

III. IMMEDIATE ENTRY INTO THE VEHICLE.

The State concedes that the dog’s sniff of the interior of the vehicle was a search but argues that it was reasonable because it was supported by probable cause. Solomon disagrees for the reasons already stated. By the time Officer Arvai arrived, Deputy Valenti had abandoned his search without discovering any contraband. The State suggests that the quantity of cash located in the center console “contributes to probable cause,” but the actual amount is not specified. Furthermore, the cash was found with the title to a vehicle. Deputy Valenti had a hunch that proved correct – that contraband was in the vehicle – but at the time the canine arrived that was all he had. Under these circumstances, Solomon asserts that the dog’s immediate entry into the vehicle was unreasonable and violated his Fourth Amendment rights.

IV. INEVITABLE DISCOVERY.

The State argues that even if a constitutional violation occurred with regard to the dog’s search of the car, the evidence should not be suppressed because it would have inevitably been discovered. (State’s Brief, 18.) When the government obtains evidence as the result of a constitutional violation, exclusion is a judicial remedy to deter future violations by law enforcement. *See State v. Eason*, 2001 WI 98, ¶¶ 39-45, 245 Wis. 2d 206, 629 N.W.2d 625. An exception to the exclusionary rule is the doctrine of inevitable discovery. *State v. Jackson*, 2016 WI 56, ¶ 47, 369 Wis. 2d 673, 882 N.W.2d 422, *citing Nix v. Williams*, 467 U.S. 431 (1984).

Under the inevitable discovery doctrine, evidence obtained through illegal means “may be admissible if the tainted evidence would have been inevitably discovered by legal means.” *Jackson* at ¶ 47 (citations omitted).

The State asserts that Deputy Valenti would have completed his search had a dog not been available and that “there seems little question that [he] would have found the evidence.” (State’s Brief, 21.) The assertion, however, is speculative and not fully developed. For instance, Deputy Valenti indicated that he had not finished his search, but the record is vague about where he intended to further search. In addition, it is not clear where the backpack that contained the evidence was located within the vehicle.

Deputy Valenti terminated his search and unlawfully extended the stop. Remanding to the circuit court to conduct an evidentiary hearing as the State suggests would do little to deter police future violations and might incentivize officers to extend stops to wait for canines to conduct searches when there is not a reasonable basis to do so.

CONCLUSION

The search of the vehicle and the extension of the traffic stop were unreasonable and unconstitutional. Solomon therefore respectfully requests that this court reverse the decision and judgment of the circuit court, order that he be permitted to withdraw his guilty pleas, order the evidence obtained as a result of law enforcement’s unlawful actions be suppressed, and remand the case to the circuit court for further proceedings.

Dated this 15th day of November, 2022.

Gabriel Houghton,
Counsel for Defendant-Appellant
Electronically signed by:
Gabriel Houghton
State Bar No. 1083255

RULE 809.19(8g)(a) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. (RULE) 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of the brief is 1,331 words.

Dated this 15th day of November, 2022

Gabriel Houghton,
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RULE 801.18(6) CERTIFICATION

I certify that in compliance with Wis. Stat. §801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 15th day of November, 2022

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